Supreme Court, U.S.
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No. 02-223

IN THE

Supreme Court of the United States

KENNETH ANGARONE AND THOMAS MCGANN,
Petitioners,

v.

JOSEPH P. IENCO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

The parties are in agreement that Officers Angarone and McGann's actual testimony qualified for immunity. See Pet. 10-13; Resp. Br. 13, 22-23. They also agree that the officers would have lacked immunity altogether had respondent sued them for an unlawful search and seizure (Pet. 13 n.9; Resp. Br. 19 n.9), although, as the court of appeals acknowledged, respondent failed to bring such a claim within the applicable limitations period. See Pet. App. 11a. Thus, the parties' disagreement is over whether respondent can resuscitate a time-barred search and seizure claim by claiming that he was deprived of a fair trial in the underlying criminal case against him, and evade the officers' immunity for their testimony by focusing instead on the officers' alleged failure to disclose before trial information inconsistent with their subsequent testimony.

Respondent's claim that there is neither conflict nor confusion in the lower courts on the question presented by the petition is flatly incorrect, as we explain below. Equally important, however, is respondent's silence on what is perhaps the most compelling reason to grant the petition—the holding below, if unreviewed, effectively eviscerates the testimonial immunity of police officers recognized in *Briscoe v. LaHue*, 460 U.S. 325 (1983). While respondent claims that the holding in this case does not eliminate immunity for claims of police perjury (*e.g.*, Resp. Br. 13, 19), he ignores the reality that "[a] claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested." *Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976). See Pet. 13-16. Thus, plenary review is appropriate here if for no other reason than to determine whether the immunity doctrine recognized in *Briscoe* is, in practical effect, to survive.

1. Respondent boldly claims that the circuits "are in perfect unanimity that pre-testimonial misconduct by law enforcement officials does not become retroactively immunized by the expedient of testifying." Resp. Br. 1. But in the most obvious terms, there is not unanimity. Respondent's view has been accepted in the Second Circuit, in that court's decision in *San Filippo v. U.S. Trust Co. of New Jersey, Inc.*, 737 F.2d 246 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985), and is now the law in the Seventh Circuit by virtue of the holding below. But the holding in *San Filippo* has been expressly repudiated by a number of other circuits. See, *e.g.*, *Franklin v. Terr*, 201 F.3d 1098, 1102 (9th Cir. 2000); *Jones v. Cannon*, 174 F.3d 1271, 1288 (11th Cir. 1999); *Miller v. Glanz*, 948 F.2d 1562, 1570-71 (10th Cir. 1991). That alone should make plain that respondent's claim of "unanimity" in the circuits is unsupportable.

Respondent dismisses the cases that we identified in the petition as being in conflict with the decision below by

claiming that none of them "addresses the applicability of testimonial immunity to misconduct by a police officer followed by the officer's testimony in a trial or adversarial pre-trial proceedings." Resp. Br. 18 (emphasis deleted). To the contrary, in each of the cases we identify in the petition, testimonial immunity was held to reach pretrial misconduct aimed at producing perjurious testimony. See Pet. 7-8. In *Franklin*, for example, the court held that a witness's pretrial meetings with other witnesses in an effort to ensure that they testified consistently at trial was within the scope of testimonial immunity. See 201 F.3d at 1102. In *Jones*, the court held that police detectives' meetings with a potential witness in order to suborn the witness's subsequent perjured testimony were immunized. See 174 F.3d at 1288-89. In *Alioto v. City of Shively*, 835 F.2d 1173 (6th Cir. 1987), the court held that immunity applied to a conspiracy to commit perjury that "took place well before [the defendants] actually gave their testimony, i.e., during the investigative stage . . . ." *Id.* at 1174. And in *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993), a witness was afforded testimonial immunity even though the complaint alleged that the witness had conspired to conceal material information that she had learned during the course of her pretrial investigation. See *id.* at 9. Each of these decisions is wholly inconsistent with respondent's view that testimonial immunity can never reach pretrial misconduct, and equally inconsistent with the Seventh Circuit's holding in this case that "no absolute testimonial immunity attaches to the actions of the officers outside of trial . . . ." Pet. App. 10a.

Respondent also attempts to put aside cases holding that pretrial misconduct alleged to be part of a conspiracy to commit perjury falls within the scope of testimonial immunity. These, he claims, rest only "on the principle that a person may not be prosecuted for conspiracy to commit an act that he may perform with impunity." Resp. Br. 18-19 (footnote omitted). But not all of the cases on which we rely

involve conspiracy claims. Moreover, the principle that immunity cannot be circumvented by suing for acts that are themselves merely preparatory to an immunized act is not limited to conspiracy. In *Imbler*, for example, this Court refused to recognize an exception to prosecutorial immunity for a prosecutor's failure to disclose exculpatory information prior to trial, since the failure to disclose exculpatory information was merely preparatory to the immunized act of presenting allegedly perjured testimony at trial. See 424 U.S. at 431 n.34. In *Jones*, the Eleventh Circuit likewise recognized that immunity reaches pretrial acts that are preparatory to testimony even when the plaintiff's claim is not for conspiracy. In that case, the plaintiff attempted to avoid immunity by characterizing his claim as based on pretrial subornation rather than a conspiracy to commit perjury, yet the court found immunity equally applicable: "Although Jones presses a claim that Powers suborned the perjured testimony from a trial witness and not a claim for conspiracy to present perjured testimony at trial, we believe the reasoning of these cases [recognizing immunity on conspiracy claims] applies equally here." 174 F.3d at 1288-89 (footnotes omitted). Similarly, in *Watterson*, the First Circuit recognized immunity on claims of both conspiracy and an alleged failure to disclose material facts to the court. See 987 F.2d at 9.

In short, the Second and Seventh Circuits have refused to recognize testimonial immunity for pretrial conduct, while other circuits have held that pretrial conduct aimed at producing allegedly perjured testimony—whether characterized as a conspiracy, subornation, or a failure to disclose material information—qualifies for immunity. There is, quite plainly, conflict, not unanimity, in the circuits.

2. In what is presumably an effort to demonstrate that the decision below is consistent with something more substantial than the Second Circuit's much criticized opinion in *San*

Filippo, respondent cites a number of other cases that he contends supports the decision below. These cases, in fact, have little if anything to do with the question presented in this case.

Respondent invokes a large number of decisions based on the so-called complaining witness doctrine, which denies immunity to those responsible for an unlawful arrest. In *Malley v. Briggs*, 475 U.S. 335 (1986), for example, the Court held that an officer was not immune for his sworn complaints and supporting affidavits seeking arrest warrants that were allegedly unsupported by probable cause, applying the common law doctrine denying immunity to "one who procured the issuance of an arrest warrant . . . maliciously and without probable cause . . . ." *Id.* at 340-41. Similarly, in *Kalina v. Fletcher*, 522 U.S. 118 (1997), the Court applied the complaining witness doctrine to deny immunity to a prosecutor who provided sworn testimony in support of an arrest warrant that was allegedly false and unsupported by probable cause. See *id.* at 129-31. But these cases, and the complaining witness doctrine itself, lend no support to the decision below. For one thing, the Seventh Circuit expressly disavowed any reliance on the complaining witness doctrine in the decision below. See Pet. App. 10a n.9. For another, as the opinions in *Malley* and *Kalina* make plain, the complaining witness doctrine is applicable only to actions challenging the validity of an arrest, while respondent's claim does not challenge his arrest, but instead asserts that he was denied his right to a fair trial. See Pet. App. 7a-8a. Thus, these cases do not address the conflict in the circuits over the scope of immunity when the complaining witness doctrine is inapplicable.[1]

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[1] In any event, even the potential applicability of the complaining witness doctrine argues for and not against plenary review here. As we explain in the petition, the circuits are split on whether the complaining witness doctrine defeats testimonial immunity in cases like this one. See

Indeed, most of the decisions that respondent cites are no more than applications of the complaining witness doctrine. *White v. Frank*, 855 F.2d 956 (2d Cir. 1988), for example, involved grand jury testimony, and the court expressly rested its holding on the complaining witness doctrine. See *id.* at 960-61. In *Anthony v. Baker*, 767 F.2d 657 (10th Cir. 1985), the court also held that grand jury testimony is not immunized. See *id.* at 663-64. The court's subsequent opinion in that case, moreover, made clear that grand jury testimony lacks immunity because of the complaining witness doctrine. See *Anthony v. Baker*, 955 F.2d 1395, 1399-1400 (10th Cir. 1992). Similarly, in *McArdle v. Tronetti*, 961 F.2d 1083 (3d Cir. 1992), the court held that the filing of an allegedly false civil commitment petition involved the initiation of a judicial proceeding and therefore was not within testimonial immunity. See *id.* at 1085-86.[2] To similar effect are *Krohn v. United States*, 742 F.2d 24 (1st Cir. 1984), in which immunity was denied on a claim that an officer had procured an arrest warrant that was unsupported by probable cause (see *id.* at 31), and *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (5th Cir.), modified, 744 F.2d 1131 (1984), in which the court held that statements made at a non-adversarial probable cause hearing inquiring into the justification for an arrest are not immunized (see *id.* at 261).[3] The portion of the Eleventh Circuit's decision in *Jones* denying an officer immunity for an affidavit seeking an arrest

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Pet. 9 n.6. And even respondent does not deny the existence of a conflict in the circuits on this point.

[2] The court also held, however, that immunity reached McArdle's allegations that the defendants engaged in a pretrial conspiracy "to have him falsely diagnosed as a paranoid schizophrenic." 961 F.2d at 1085.

[3] The Fifth Circuit expressly limited the holding in *Wheeler* to nonadversarial hearings evaluating the propriety of an arrest in *Moore v. McDonald*, 30 F.3d 616 (5th Cir. 1994), where it also held that testimony at a suppression hearing—the type of proceeding at issue here—is immunized. See *id.* at 619-20.

warrant was also based on the complaining witness doctrine. See 174 F.3d at 1284-85. All of these cases applying the complaining witness doctrine to false arrest claims are wholly inapplicable here.[4]

Equally irrelevant are cases denying immunity to non-testimonial misconduct, such as the holding in *Jones* denying immunity to a detective alleged to have fabricated boot print evidence against an accused (see 174 F.3d at 1289-90), and the holding in *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999), denying immunity to defendants alleged to have fabricated tape-recorded evidence (see *id.* at 998-99, 1002-04). Even respondent does not identify any physical evidence that Officers Angarone and McGann allegedly fabricated; the only evidence that respondent contends was fabricated was the officers' own testimony. See Resp. Br. 4-7.[5]

Indeed, if anything, the holding in *Spurlock*, in particular, reinforces the need for plenary review in this case. In *Spurlock,* the Sixth Circuit held that subornation of perjury

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[4] *Enlow v. Tishomingo County*, 962 F.2d 501 (5th Cir. 1992), is even further afield. In that case, the court remanded for further proceedings because it could not tell whether the defendant claiming immunity was a complaining witness. See *id.* at 511-12. And in *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992), which involved prosecutorial and not witness immunity, the court pointed out that the defendant had not asserted an immunity defense on a claim that he had fabricated evidence against an accused. See *id.* at 1467.

[5] Of course, a plaintiff cannot invoke the exception to immunity for nontestimonial conduct unless he identifies some evidence nontestimonial in character that the defendant fabricated. For example, in *Alioto*, the Sixth Circuit observed:

> Although the doctrine of witness immunity does not shield from liability alleged conspiracy to falsify nontestimonial evidence, the only facts asserted by Alioto concerned defendants' alleged conspiracy to give false testimony. Accordingly, this argument is also without merit.

835 F.2d at 1174 n.1.

does not fall within the ambit of testimonial immunity. See 167 F.3d at 1001-02. That holding is inconsistent with the Eleventh Circuit's subsequent decision in *Jones*, recognizing immunity on subornation claims. See 174 F.3d at 1288-89. Thus, perhaps inadvertently, respondent's reliance on *Spurlock* only highlights the extent to which there is confusion and, indeed, outright conflict in the circuits on the question presented in the petition.

Respondent's reliance on the two remaining cases that he cites is particularly misleading. In *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988), while the court assumed that testimonial immunity did not reach pretestimonial conduct, it did so without any analysis of that issue (see *id.* at 424-25), and the Eleventh Circuit subsequently retreated from that position in *Jones*, as we explain above. And although respondent is correct that in *Mastroianni v. Bowers*, 160 F.3d 671 (11th Cir. 1998), the court held that testimonial immunity will not reach a pretestimonial conspiracy (see *id.* at 678 n.5), the court reconsidered that holding on rehearing, ultimately concluding that immunity will reach even pretrial misconduct when the plaintiff's claims "are supportable . . . only by consideration of the actual contents of the allegedly perjured testimony . . . ." *Mastroianni v. Bowers*, 173 F.3d 1363, 1367 (11th Cir. 1999). And as we explain in the petition and reiterate below, that proposition is fully applicable to this case.

3. Respondent defends the decision below by claiming that immunity is limited to "the performance of functions 'intimately associated' with the judicial process." Resp. Br. 10 (quoting *Malley*, 475 U.S. at 342). He then argues that the claims in this case lack an association with the judicial process, because they "are not based on the officers' perjured testimony." Resp. Br. 13 (quoting Pet. App. 10a). To make this argument, however, respondent ignores virtually everything we have to say on this subject in the petition.

As we explain in the petition, respondent's claim that he was denied his right to a fair trial under *Brady v. Maryland*, 373 U.S. 83 (1963), is wholly and inextricably tied to the judicial process, since such a claim can only be based on what occurs at an accused's trial. See Pet. 10-12. We also explain that respondent's claim necessarily rests on the officers' testimony; had they not testified they could not have deprived respondent of his right to a fair trial. See Pet. 12-13. But respondent wholly ignores our submission. While he asserts that his constitutional claim is based on pretrial misconduct, he does not even attempt to explain how he could have been deprived of his right to a fair trial through pretrial misconduct alone. The constitutional claim that he brought—the only one on which he had not blown the statute of limitations—necessarily depends on the officers' testimony, which even respondent concedes is sufficiently intertwined with the judicial process as to qualify for immunity. Indeed, that was the square holding in *Briscoe*.

4. We also explain in the petition that the practical effect of the holding below is to wholly eviscerate the doctrine of testimonial immunity, since plaintiffs will always be able to refashion claims based on perjured testimony as instead based on a police officer's failure to disclose exculpatory information about his own anticipated testimony prior to trial. See Pet. 13-16. Respondent, rather than answering this point, makes a confusing response that ultimately seems to advocate the effective overruling of *Briscoe*.

First, respondent, citing cases applying the complaining witness doctrine, observes that not all sworn statements of police officers receive immunity. See Resp. Br. 23-25. That is entirely beside the point. While not all sworn statements of police officers are immunized, at least some are—and as this Court held in *Briscoe,* immunity unquestionably attaches to an officer's testimony at trial. Respondent, however, does not even attempt to explain how *Briscoe* will remain applicable to

any cases at all, given the ability of plaintiffs to recharacterize any claim based on perjured testimony as instead based on an officer's pretrial failure to disclose exculpatory information.

Second, respondent claims that the costs of defending the claims against police officers that will be permitted under the holding below should be appropriately shifted to the taxpayers in order to deter misconduct. See Pet. 25-26. This, however, is precisely the kind of burden that this Court rejected in its holding in *Briscoe*. See 460 U.S. at 342-45.[6] While respondent may believe that the burdens of defending this type of litigation are appropriately imposed on police officers and the taxpaying public, in *Briscoe* the Court struck the balance differently. The court of appeals should not be permitted to effectively undo *Briscoe* by permitting plaintiffs to reframe claims based on perjured testimony as instead based on a pretrial failure to disclose exculpatory evidence.

CONCLUSION

The petition for writ of certiorari should be granted.

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[6] Moreover, as Professor Levinson has demonstrated, it is far too simple to expect that passing along the costs of civil litigation to the tax-paying public will create an effective means of deterring constitutional violations. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 361-87 (2000).

Respectfully submitted,

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